No. 94-3

IN THE

Supreme Court of the United States

October Term, 1994

REYNOLDSVILLE CASKET CO., *et al*
Petitioners,

vs.

CAROL L. HYDE,
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF BROWN & SZALLER CO., L.P.A., SPANGENBERG, SHIBLEY, TRACI, LANCIONE & LIBER, THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA, AND THE OHIO ACADEMY OF TRIAL LAWYERS IN SUPPORT OF RESPONDENT

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MOTION TO APPEAR AS *AMICI*

The law firm of Brown & Szaller Co., L.P.A., the law firm of Spangenberg, Shibley, Traci, Lancione & Liber ("Spangenberg"), the Association of Trial Lawyers of America ("ATLA") and the Ohio Academy of Trial Lawyers ("OATL") (collectively "*amici*") respectfully request leave to appear as *amici curiae* on the merits in support of the Respondent.

The law firms of Brown & Szaller and Spangenberg represent Ohio residents who allege injury from use of the A.H. Robins Company's ("Robins") Dalkon Shield intrauterine

device ("IUD"). ATLA and OATL are voluntary bar associations whose members primarily represent injured victims in personal injury actions. These attorneys, some of whom represent Ohio Dalkon Shield victims, are committed to the proposition that the right to seek legal redress in court for wrongful injury is fundamental to Americans. This right is secured in many states, including Ohio, by express provisions of the state Constitution. ATLA and OATL have participated as *amicus curiae* in this Court and in cases throughout the United States in support of injury victims whose right to seek redress may be extinguished by legislative or judicial action.

A significant portion of Ohio's Dalkon Shield victims and their attorneys relied on Ohio's tolling statute to determine *when* to file claims against Robins, the Virginia corporation that manufactured the Dalkon Shield. Robins filed for reorganization on August 21, 1985, which automatically stayed all litigation against it and prohibited the filing of any new actions. Subsequent to their filing, and during Robins' reorganization this Court determined Ohio's tolling statute violative of the Commerce Clause in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988). Because the issue of the retroactivity of *Bendix* appeared ripe for the Ohio Supreme Court to determine in *Hyde v. Reynoldsville Casket Co.*, 68 Ohio St. 3d 240, 626 N.E.2d 75 (1994), Brown & Szaller, Spangenberg, and OATL appeared as *amici* on Respondent's behalf in the Ohio Supreme Court. Counsel from Brown & Szaller presented oral argument. Counsel argued, on behalf of the Ohio Dalkon Shield victims, that the very recent decision in *Harper v. Virginia Department of Taxation*, 509 U.S.____, 113 S. Ct. 2510 (1993) mandated retroactively applying this Court's decision in *Bendix*, but that *Harper's* directive for the state to determine the appropriate remedy to be accorded Respondent also required the Ohio Supreme Court

to consider the inequity to the Respondent and the plight of Dalkon Shield victims who might lose their right to pursue litigation filed at a time when there was no reason to believe that the statute of limitation might have run. The Ohio Supreme Court did, but if this Court reverses *Hyde*, Dalkon Shield victims residing in Ohio may be barred from pursuing claims that were timely filed under Ohio law.

This Court has granted the Motion of the Dalkon Shield Claimants Trust ("Trust") (the liability successor to Robins for claims of those injured by the Dalkon Shield IUD) for leave to file as *amicus* in support of the Petition for Writ of Certiorari; the Trust has filed a Motion to appear as *amicus* on the merits.

Pursuant to U.S. Supreme Court Rule 37.3, the undersigned *amici* requested, in writing, permission of the parties for *amici's* participation. Petitioners refused; Respondent granted permission. (See Exhibits A, B, C and D, attached.)

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

Whether federal law requires the dismissal of state court cases that appeared timely when filed, but proved untimely under the retroactive application of *Bendix Autolite Corp. v. Midwesco Enterprises*, 486 U.S. 888 (1988).

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Cases: Page

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I. INTEREST OF THE *AMICI*

Interests of *amici* are fully described in the Motion accompanying this Brief.

A. A.H. Robins' Dalkon Shield Litigation.

The Dalkon Shield IUD was a defective and dangerous intrauterine contraceptive device manufactured, promoted and sold by the A.H. Robins Company ("Robins") of Richmond, Virginia from January 1971 to June 1974. The Dalkon Shield

spawned thousands of lawsuits[1] against Robins for a host of injuries. To stem the continuing tide of Dalkon Shield lawsuits, Robins filed for bankruptcy protection on August 21, 1985 in the United States Bankruptcy Court, Eastern District of Virginia.

During the bankruptcy proceeding, the court set a cut-off date of April 30, 1986 for the filing of claims against Robins. By this cut-off date, 179,983 Dalkon Shield victims (over 6,000 of whom were Ohio residents and some of whom had lawsuits pending in Ohio state and federal courts against Robins when Robins filed for bankruptcy protection) filed claims. A significant portion of the Ohio residents who filed claims relied on the provisions of the tolling statute (Robins was an out-of-state corporation) when they and their attorneys determined when to file claims.

All Dalkon Shield litigation pending against Robins was stayed when Robins filed its bankruptcy petition on August 21, 1985, and the Dalkon Shield litigants then filed their personal injury claims in the bankruptcy. Other Ohio Dalkon Shield victims who had not yet pursued litigation filed timely claims in Robins' bankruptcy by April 30, 1986, and were likewise prohibited from then pursuing litigation. Only within the last year have any of the Ohio Dalkon Shield victims been released and permitted to pursue litigation in the courts.

But for the Robins bankruptcy stay commenced in 1985, the victims may well have had their claims resolved by settlement or litigation prior to the 1988 decision of this Court in

[1]The Kansas Supreme Court in *Tetuan v. Robins*, 241 Kan. 441, 783 P.2d 1210 (1987) summarized Robins' wrongful conduct and the dangers of the Dalkon Shield at 783 P.2d 1240; *see also Worsham v. A.H. Robins Co.*, 734 F.2d 676 (11th Cir. 1984); *Knaysi v. A.H. Robins Co.*, 679 F.2d 1366 (11th Cir. 1982); *Palmer v. A.H. Robins Co., Inc.*, 684 P.2d 187, CCH Prod. Liab. Rept. P10, 085, 38 U.C.C. Ref. (Colo. 1984); *Hilliard v. A.H. Robins Co.*, 148 Cal. App. 3d 374, 196 Cal. Rptr. 117 (1983).

Bendix Autolite Corp. v. Midwesco Enterprises, 486 U.S. 888, 108 (1988) (hereinafter "*Bendix*"). Certainly they would have been resolved prior to the 1993 decision of *Harper v. Virginia Department of Taxation*, 509 U.S. ____, 113 S. Ct. 2510 (1993) (hereinafter "*Harper*"), in which case *Chevron Oil v. Huson*, 404 U.S. 97 (1971) (hereinafter "*Chevron Oil*"), would have determined the appropriate remedial relief.

B. Robins' Plan of Reorganization, and the Creation of the Dalkon Shield Claimants Trust.

Robins' Plan of Reorganization, confirmed in 1988 and consummated in 1989, provided for a $2.33 billion trust fund to compensate Dalkon Shield victims. The Dalkon Shield Claimants Trust was created to assume Robins' liability for Dalkon Shield injuries. Monies are to be used by the Trust to resolve cases by settlement and, failing that, to satisfy judgments, obtained through arbitration or litigation. The Plan further provided that

> [t]he law to be applied to the settlement or trial of claims shall be the law that is or would have been applicable notwithstanding the pendency of the Chapter 11 case; provided, however, that the statutes of limitations and repose applicable to claims are tolled in accordance with the Bankruptcy Code.

Trust *Amicus* Brief , App. C9.

If an offer of settlement from the Trust is rejected, the victim must attend a "settlement conference", set at the discretion of the Trust, prior to instituting arbitration or litigation. In some senses the term "settlement conference" is a misnomer, since settlement is not discussed.[2] Therefore,

[2]See Exhibit E.

although the Trust is mantled with the responsibility to effectuate settlement over the more cost consuming methods of resolution by arbitration or litigation, in many instances settlement is not possible because of the no-negotiation policy adopted by the Trust. An offer made to a victim is truly a take it or leave it offer. And if refused, many victims feel that the rules[3] requested by the Trust and approved by the District Court regarding choice-of-law and statutes of limitation in arbitration make that forum unavailable and unattractive, leaving only litigation to protect their rights. Those same rules further prohibit Dalkon Shield victims from instituting litigation against the Dalkon Shield Claimants Trust until they are "certified" by the Trust — a process which has begun for Ohio Dalkon Shield victims only within the last year.

C. Assertion of the Statute of Limitation Defense by the Dalkon Shield Claimants Trust; Affirmance of *Hyde* Will Not Detriment the Trust at the Expense of Ohio Dalkon Shield Litigants.

When it is the defendant, the Trust asserts available limitation defenses only against arguably the most seriously injured —victims who seek more than $20,000 in damages.[4] Statutes of limitation are not considered by the Trust when making offers of settlement, and are not raised in arbitrations in which the victim seeks $20,000 or less in damages.

[3]At the request of the Trust, a July 1991 Order issued from the District Court interpreting the Plan to provide, among other things, that absent "certification" by the Trust a claimant could not proceed to litigation, and that any claimant electing arbitration rather than court adjudication would proceed under Trust drafted choice-of-law and statute of limitation provisions. The order, Administrative Order No. 1, was appealed, but as of the writing of this *Amicus* Brief no decision has forthcome. A Petition for a Writ of Mandamus to the United States Court of Appeals for the Fourth Circuit was filed in this Court in November 1994.

[4]See Exhibit F, correspondence from the Dalkon Shield Claimants Trust to a Dalkon Shield victim, dated November 29, 1994.

The Trust correctly notes that, because of the decision below, it cannot successfully raise the statute in Ohio as a defense, but fails to mention that, when the Ohio Dalkon Shield victims filed claims, they were *timely*, and *not* barred by any statute. The tolling statute they relied upon when many of them filed timely claims was not held unconstitutional in *Bendix* until *after* they filed claims.

The Trust suggests *Hyde v. Reynoldsville Casket Co.*, 68 Ohio St. 3d 240, 626 N.E.2d 75 (1994) (hereinafter "*Hyde*") " . . . [benefits] Ohio Dalkon Shield claimants to the detriment of claimants in other states and [encourages] the depletion of Trust funds through litigation by Ohio claimants . . ." (Trust *Amicus* Brief at 1). *Amici* disagree for two reasons.

Finding inequities in the Trust's selective use of statute of limitation defenses, a number of state legislatures have passed legislation effectively negating the statute of limitation defense in litigation against Dalkon Shield victims in their states. (*See*, the statutes of New York, Kansas and California, attached hereto as Exhibits G, H. and I.) Therefore, *Hyde*, rather than being a "detriment" to claimants in other states, simply puts Ohio Dalkon Shield victims on an equal footing with them.

Second, approximately two-thirds of the corpus of the Trust remains, while the vast majority of timely claims (estimated at 90%) have been resolved. There is, therefore, no chance that the Ohio Dalkon Shield victims who claim serious injury in litigation will cause a shortfall in the approximate $1.5 billion dollars remaining in the fund.

II. SUMMARY OF ARGUMENT

The Ohio Supreme Court decision below held that a retroactive application of *Bendix* did not bar Respondent Carol Hyde's cause of action. *Bendix* deemed the Ohio tolling statute upon which she relied violative of the Commerce Clause, and *amici* agree that *Harper* mandated the retroactive application of *Bendix*.

The Court below did retroactively apply *Bendix*, but it correctly recognized that the "application" of the retroactive decision of this Court included the duty by the state to determine, consistent with due process, the appropriate remedy to be accorded the party aggrieved by the infirm statute.

A statute of limitation is not a fundamental right, the loss of which is a due process violation. Conversely, the Ohio Constitution guarantees the right of access to its courts. The Ohio Supreme Court's remedy analysis weighed the non-fundamental right of limitation of Petitioners against the vested right of access to the courts accorded Respondent by the Ohio Constitution. Under this analysis, the Court determined that the constitutional right substantially outweighed the right of bar of limitation, and refused to give Petitioners a remedy that would strip Respondent of her vested right of access to court.

In *Chevron Oil*, this Court enunciated equitable principles which are as applicable to remedy analysis as they are to choice-of-law inquiries. Utilizing those principles to determine the remedy to be accorded, the Ohio Supreme Court determined that *Bendix* overturned "clear past precedent" which was reasonably relied upon by her, and again refused to dismiss her complaint.

The remedy analysis by the Ohio Supreme Court was proper, equitable and balanced. The decision below should be affirmed.

III. ARGUMENT

A. When Retroactively Applying a Decision of this Court Which Deemed a State Tolling Statute Violative of the Commerce Clause, the State's Determination of a Remedy is Consistent With Due Process When it Balances a Fundamental Vested Right of Access to the Courts Against the Non-Fundamental Right of a Bar by Limitation.

1. The Ohio Supreme Court in Fact Retroactively Applied *Bendix*.

In *Harper*, the plurality decision announced by Justice Thomas made clear that

> [w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

Id., 113 S. Ct. at 2517.

Bendix continued the recognition enunciated in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991) (hereinafter "*Beam*"), that the Supremacy Clause forbids "federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law." *Harper*, 113 S. Ct. at 2519. *Harper* put on the same plane in the civil arena the criminal retroactivity doctrine expressed in *Griffith v. Kentucky*, 479 U.S. 314 (1987).

The Court below characterized its own decision as one which " . . . does not contravene the federal constitutional analysis in *Bendix*, but, instead, allows Section 16, Article I of the Ohio

Constitution and the Commerce Clause of the federal Constitution to co-exist." *Hyde*, 626 N.E.2d at 78. The Ohio Supreme Court adhered to the retroactivity mandate of *Harper*, but the refusal to bar vested claims which had accrued prior to announcement of *Bendix* was the product of remedy analysis. The holding below was correctly characterized by *amicus* Dalkon Shield Claimants Trust:

> In the second part of [the Ohio Supreme Court's] opinion, the Ohio Supreme Court holds, in the alternative, that the retroactive application of *Bendix* does not require a dismissal of Respondent's claims.

Trust *Amicus* Brief at 7.

The holding of the Ohio Supreme Court was the result of its applied understanding of this Court's decision in *Harper*. The Court below phrased that understanding of *Harper's* dictates as follows:

> . . .[A] state, when retroactively applying a Supreme Court decision, "retains flexibility" in fashioning appropriate relief . . .(citation omitted). . . *Harper* allows state courts to tailor their own remedies as they determine the manner in which a Supreme Court opinion *is to be retroactively applied*.

Hyde, 626 N.E.2d at 77 (emphasis supplied).

2. Having Retroactively Applied *Bendix*, as Mandated by *Harper*, the Ohio Supreme Court Had the Responsibility of Determining a Remedy, and Consistent With Due Process to be Accorded Petitioners Balanced the Fundamental Vested Right of Access to the Courts Against the Non-Fundamental Right of a Bar by Limitation.

Once retroactivity of a federal decision is applied by the state court, the state must then determine, consistent with federal

due process, the appropriate remedy to be accorded the litigant whose rights have been violated.

> . . . The remedial inquiry is one governed by state law, at least where the case originated in state court . . . [T]he antecedent choice-of-law question is a federal one where the rule at issue itself derives from federal law, constitutional or otherwise.

Beam, 501 U.S. at 535.

This Court answered the antecedent question in *Bendix*, and held Ohio's tolling statute unconstitutional. Having made that decision retroactive by *Beam* and *Harper*, the remedial inquiry, "*i.e.*, whether the party prevailing under a new rule should obtain the same relief that would have been awarded if the rule had been an old one" (*Beam*, 501 U.S. at 535), is then for the state to decide consistent with federal due process.[5]

This Court recognized in *Bendix* that the Ohio statute of limitation it deemed violative of the Commerce Clause was "an integral part of the legal system and . . . relied upon to protect the liabilities of persons and corporations active in the commercial sphere", but the statute of limitation was not a "fundamental right". *Bendix*, 486 U.S. at 893, *citing Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945). *Chase* held that the taking of the bar of a statute of limitation from a defendant by retroactive legislation is not a *per se* Fourteenth Amendment violation.

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[5] "In fact, the only federal question regarding remedies is whether the relief afforded is sufficient to comply with the requirements of due process. *See McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 31-52, 110 S.Ct. 2238, 2247-2258, 110 L.Ed.2d 17 (1990)." *Beam* at 2443 (O'Connor,J., dissenting).

> The Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation. What it does forbid is taking of life, liberty or property without due process of law. . . . [C]ertainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment.

Id., 325 U.S. at 304-05.

A statute of limitation is not a fundamental right protected by the Fourteenth Amendment, and due process is not violated when the benefits of a statute of limitation are taken from a defendant by retroactive legislation. The Ohio Supreme Court has likewise recognized that judicial retroactive taking of statute of limitation benefits by court decision (recognizing a "discovery rule" as opposed to "termination of patient relationship" for commencement of a medical malpractice cause of action) is not the taking of a "vested right".

> Although the new rule has the potential of exposing doctors (and their insurance companies) to liability for greater periods of time than did the old rule, it is a procedural change and does not entail the disruption of any contractual or vested right.

Obral v. Fairview General Hospital, 13 Ohio App. 3d 57, 59-60, 468 N.E.2d 141 (Cuy. Cty. 1983), citing *Gregory v. Flowers*, 32 Ohio St. 2d 48, 290 N.E.2d 181 (1972).

Conversely, the pursuit of "a cause of action existing at the time of a remedial [limitation] statute is a vested right "that cannot be taken away" under Ohio law. *Gregory v. Flowers*, 32 Ohio St. 2d 48 290 N.E.2d 181 (1972), *citing Smith v. New York Central Railroad Co.*, 120 Ohio St. 45 170 N.EE. 637 (1945). Nor can such a vested right be taken by judicial

decision. *Peerless Electric Co. v. Bowers*, 164 Ohio St. 209 129 N.E.2d 467 (1955). *In accord, State ex rel. Tavenner v. Indian Lake School District*, 62 Ohio St. 3d 88, 578 N.E.2d 464 (1955). The Ohio Constitution forbids the taking of a vested cause of action from a personal injury plaintiff because it "would totally destroy an accrued substantive right". *Adams v. Sherk*, 4 Ohio St. 3d 37, 446 N.E.2d 165 (1983).

The Court below was charged by *Beam* and *Harper* to perform a remedial analysis consistent with due process, and in so doing could consider the individual equities in the analysis. Justice Souter in *Beam* counseled, "nothing we say here precludes consideration of individual equities when deciding remedial issues in particular cases." *Beam*, 501 U.S. at 543.

Weighing the remedy to be accorded Petitioners, the lifting of the ban of the statute of limitation against the loss to a litigant of her Ohio Constitutionally protected vested right of access to court, the Hyde court denied Petitioners' dismissal of the cause of action brought against them by Carol Hyde. The decision was simply the result of the "consideration of individual equities", permitted by *Chevron Oil*. The Court weighed the Ohio Constitutional right of access to court against a right protected neither by Federal nor state Constitution. The Court's remedy did not provide Petitioners with a bar of limitation, but such a result was proper because relief may be "denied 'retroactive' effect" in the sense that independent principles of law [may] limit the relief that a court may provide under current law." *American Trucking Assns., Inc. v. Smith*, 496 U.S. 167, 209 (1990) (Stevens, J., dissenting).

B. When Retroactively Applying a Decision of This Court Which Deemed a State Tolling Statute Violative of the Commerce Clause, the State's Determination of a Remedy is Consistent With Due Process When It Considers (a) Whether the Decision to be Applied Retroactively Establishes a New Principle of Law or Overturns Clear Past Precedent on Which Litigants May Have Relied, (b) Whether Denying the Rule Retroactive *Effect* Will Retard its Operation in Light of the Rule's History, Purpose and Effect and, (c) Whether the Decision Could Produce Substantial Inequitable Results if Applied Retroactively Without Benefit of Remedy.

1. The Ohio Supreme Court in *Hyde* Retroactively Applied *Bendix*, per the Mandate of *Harper* (*see* Argument (A)(1), *supra*).

2. After Retroactively Applying a Decision of this Court Which Deemed a State Tolling Statute Violative of the Commerce Clause, the State's Determination of a Remedy is Consistent With Due Process When it Weighs the Remedial Principles of *Chevron Oil*.

In *Chevron Oil*, the decision in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), (holding that Louisiana's one-year limitation on personal injury actions applied to actions arising on the outer continental shelf), did not require dismissal, because to do so would deprive the plaintiff of the right to proceed with litigation on the basis of unforeseeable superseding legal doctrine.

The plaintiff in *Chevron Oil* had instituted the action more than one year before *Rodrigue* had been decided. As a result of *Rodrigue*, however, the plaintiff's action was time barred more than two years before *Rodrigue* was decided. In such circumstances, this Court concluded that *Rodrigue* did not require retroactive remedies based on a consideration of the following three factors:

> First, the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application for "where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of non-retroactivity."

Chevron Oil, 404 U.S. at 106-07.

State courts may be guided by similar equitable principles in their remedial analysis of the effect of application of a retroactive decision of this Court. "The generalized enquiry permits litigants to assert, and the courts to consider, the equitable and reliance interests of parties absent but similarly situated." *Beam*, 501 U.S. at 543. The equitable principles that guided this Court in *Chevron Oil* have, at times, been characterized as "remedial principle[s] for the exercise of equitable discre-

tion" (*American Trucking Assns. v. Smith*, 496 U.S. 167, 220 (1990) (hereinafter *American Trucking*) (Stevens, J., dissenting) rather than "choice-of-law principles." (*Id.*)

Thus, the principles that drove *Chevron Oil*, whether cast as choice-of-law or remedial principles, are fully applicable here, and it was appropriate for the Court below to consider them when determining the remedy to be accorded after retroactive application of *Bendix*. Rodrigue was a case of first impression, as was *Bendix*. *Rodrigue* effectively overruled a long line of decisions; so, too, *Bendix* overruled a long line of Ohio cases upholding the Ohio tolling statute. When Respondent filed her complaint, just as the injured party in *Chevron Oil*, the most she could do was "rely on the law as it then was." *Id.*, 404 U.S. at 108. The Court in *Hyde* below had the same reluctance as this Court in *Chevron Oil* to abruptly terminate a lawsuit and thereby deprive the injured party of any remedy whatsoever on the basis of "a subsequent determination . . . [she] could not have foreseen." *Hyde*, 626 N.E.2d at 78.

Use of *Chevron Oil* principles by the *Hyde* Court in its remedial analysis of the "retroactive effect" (*American Trucking* , 496 U.S. at 209, (Stevens, J., dissenting) of a retroactivity bar of limitation was especially appropriate.

> . . .*Chevron Oil* involved the application of a statute of limitations, an area over which the federal courts historically have asserted equitable discretion to craft rules of tolling, laches and waiver.

Id., at 221 (Stevens, J., dissenting)

a. Bendix Overturned Past Precedent on Which Respondent Carol Hyde Reasonably Relied.[6]

The finding by the Court below that Respondent reasonably relied upon the statute and "could not have foreseen that [it] would be struck down" (*Hyde*, 626 N.E.2d at 77) is well supported. A review of the Ohio tolling statute cases demonstrate that the statute was uniformly applied to out-of-state corporations not subject to personal jurisdiction and was never held to be unconstitutional until *Bendix*.

In *Title Guaranty & Surety Co. v. McAllister Admx.*, 130 Ohio St. 537, 200 N.E. 831 (1936), the Court held that if the plaintiff could obtain service within the limitations period, a defendant corporation was not "out of the state" or "concealed" within the meaning of the tolling statute.

The holding of *Title Guaranty* was soon severely limited, then forever discarded altogether.

The Ohio Supreme Court began the limiting process by first distinguishing *Title Guaranty*. In *Commonwealth Loan Co. v. Firestine*, 148 Ohio St. 133, 73 N.E.2d 501 (1947), the court held that the tolling statute tolled the running of the statute of limitations against a person, as distinct from a corporation, absent from the state, against whom judgment might be taken pursuant to a cognovit note.

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[6]Petitioner's assertion that "in *Crespo v. Stapf*, 608 A.2d 241 (1992), the New Jersey Supreme Court decided essentially the same issue and concluded that a *Chevron Oil Company v. Huson* analysis dictated the retroactive application of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*" (Petitioners' Brief, at 27) is in error. The New Jersey Supreme Court did not retroactively apply *Bendix*, but instead relied heavily on the prospective application of its earlier decision in *Coons v. American Honda Motor Co., Inc.*, 94 N.J. 307, 463 A.2d 921 (1983), *cert. denied* 469 U.S. 1123.

Three years later, in *Couts v. Rose*, 152 Ohio St. 458, 90 N.E.2d 139 (1950), the Court held that a person who leaves the state after the accrual of a cause of action against him tolls the running of the statute of limitations. *Couts* was quickly followed by *Meekison v. Groschner*, 153 Ohio St. 301, 91 N.E.2d 680 (1950), which held that the savings statute applies to a defendant obligated under a promissory note irrespective of whether the person left the state after execution of the note or was out of the state when he executed the note. Thus, in a span of four years, the Ohio Supreme Court moved completely away from using service of process as a measurement, and began focusing exclusively on the defendant's absence from the state.

In *Moss v. Standard Drug Co.*, 159 Ohio St. 464, 112 N.E.2d 542 (1953), the Ohio Supreme Court expanded the scope of the statute when it held that the word "person" in the saving statute included a corporation.

Thompson v. Horvath, 10 Ohio St. 2d 247, 227 N.E.2d 225 (1967), held that if a *domestic* corporation (as opposed to a "person", *Id.* at 406) leaves Ohio but can still be served by substitute service, the tolling statute does not apply. And *Partis v. Miller Equipment Co.*, 439 F.2d 262 (6th Cir. 1971), followed the new Ohio Supreme Court lead of *Thompson* — short-lived as it was.

Just one month later, the Ohio Supreme Court decided *Seeley v. Expert, Inc.*, 26 Ohio St. 2d 61, 269 N.E.2d 121 (1971). The *Seeley* court held that application of the tolling statute is not limited to persons who were residents of the state and then left after the accrual of a cause of action, but also extended to persons who were never residents of the state. In reliance on *Couts* and *Commonwealth Loan Co.*, the *Seeley* court decided that the tolling statute applies even though service of process via the long arm statute could have been obtained at any time.

The *Seeley* court specifically rejected *Title Guaranty* and *Thompson*, and seemingly limited its application to their specific facts. The Court held that application of the tolling statute is proper so long as the defendant could not be served by personal service. Since personal service requires an in-state presence, the Court was stating clearly that if a defendant has no presence within the state of Ohio, the tolling statute tolls the statute of limitations.

In *Ohio Brass Co. v. Allied Products Corp.*, 339 F. Supp. 417 (N.D. Ohio 1972), an Ohio district court specifically held that *Seeley*, not *Partis*, governed the application of the tolling statute and that the tolling statute applies so long as the defendant is not subject to personal service.

In *Durham v. Anka Research, Ltd.*, 60 Ohio App. 2d 239, 396 N.E.2d 799 (Ham. Cty. 1978), the court of appeals held that, in reliance on *Seeley*, the tolling statute applies to an out-of-state corporation, even though it was amenable to service of process under the long arm statute. Likewise, in reliance on *Seeley* and *Ohio Brass*, the district court in *Mead Corp. v. Allendale Mut. Ins. Co.*, 465 F. Supp. 355 (N.D. Ohio 1979), held that a defendant who is not amenable to personal service is out-of-state within the meaning of the tolling statute.

In 1981 a federal district court in *Vostack v. Axt*, 510 F. Supp. 217 (S.D. Ohio 1981) relied upon this Court's decision in *Chase* when it held that "defendants have no fundamental right to the protection of limitations statutes." *Vostack*, 510 F.Supp. at 221. Then, applying the rational basis test, the court determined the statute did not violate due process.

Prior to the filing of Respondent's complaint against Petitioners, the "most recent interpretation of [the] statute by the Court of Appeals in her appellate district" (Hyde, 245), *May v. Leidl*, 32 Ohio App. 3d 36, 513 N.E.2d 1347 (Gea.

Cty. 1986), held that "a corporation that is neither physically present in Ohio nor has a statutory agent in Ohio does not receive the protection of the two-year limitations period for personal injury . . ." *Id.*, at 37. A federal district court the next year (1987) agreed. *Wack v. Lederle Laboratories*, 666 F. Supp. 123 (N.D. Ohio, E.D. 1987).

Prior to its August 1985 Petition in Bankruptcy, Robins unsuccessfully challenged the tolling statute in litigation involving the Dalkon Shield in Ohio. In an attempt to dismiss claims of Dalkon Shield victims who relied on its provisions, Robins argued that the statute was violative of the Commerce Clause. Chief Judge Rubin held the statute constitutional as applied to toll limitations against Robins, finding the statute neither inf irm *per se* nor under a balancing test. *Froug v. A.H. Robins Co.*, No. 3-80-527 (S.D. Ohio, 1982) (see Exhibit J attached). Robins then unsuccessfully argued that *Froug* should be overruled based on *Coons v. American Honda Motor Co., Inc.*, 94 N.J. 307, 463 A.2d 921 (1983), *cert. den.*, 469 U.S. 1123 (1985). *In Re Shary Nunley and Other Plaintiffs v. A.H. Robins Co., Inc.*, No. C 2-80-458 (S.D. Ohio, W.D. Dayton, 1983). (See Exhibit K.)

b. Denying Retroactive *Effect* of *Bendix* Does Not Retard or Thwart its Purpose.[7]

If denial of the "retroactive *effect*" (*American Trucking*, at 209) (Stevens, J., dissenting) of *Bendix* to Petitioners thwarts the purpose of *Bendix*, such a remedy would be impermissible. *Bendix* was decided by this Court almost seven years ago. It is extremely unlikely that anyone other than Carol Hyde and the Ohio Dalkon Shield claimants will benefit from such

[7]The *Chevron Oil* Court did not discuss its analysis of this factor. Apparently, the Court found it satisfied in a statute of limitations case by finding of reasonable reliance and the substantially inequitable result of dismissal.

a remedy. When *Bendix* was decided about seven years ago, Justice Scalia questioned then whether or not "a significant burden" (*Id.*, at 888) was placed on interstate commerce by the Constitutionally infirm Ohio tolling statute. Given that virtually the only litigants today whose right of access to court will benefit from denying the retroactive *effect* of *Bendix* include Carol Hyde and the Ohio Dalkon Shield victims, the burden is infinitesimal and does not thwart the purpose of *Bendix*.

As the New Jersey Supreme Court, and later the Third Circuit Court of Appeals, analyzed:

> [C]ertainly, any inhibiting effect the statute might have on foreign corporations and others contemplating doing business in New Jersey vanishes once the statute is invalidated whether or not that invalidation is retroactive.

Cohn v. G.D. Searle Co., 784 F.2d 460, 465 (3d Cir. 1986). Out-of-state corporations are no longer the subject of discrimination in Ohio. Honoring the reliance of Carol Hyde does not retard the *Bendix* rule.

c. Substantial Inequitable Results Would Occur if the Remedy Accorded Petitioners is Dismissal of Carol Hyde's Complaint.

The cases are clear that the third element of the *Chevron* test is met in most statute of limitation situations. This Court in *Chevron Oil* observed that

> [i]t would produce the most substantial inequitable results to hold that the respondent slept on his rights at a time when he could not have known the time limitation that the law imposed on him.

Chevron Oil, at 404 U.S. 108.

In the words of the *Chevron Oil* court, "nonretroactive application here simply preserves [Carol Hyde's] right to a day in court." *Chevron Oil*, 404 U.S. at 108.

IV. CONCLUSION

The state court had a duty to determine consistent with due process the remedy to be accorded Petitioners when retroactively applying a decision of this Court to the parties before it.

It was proper for the Court below to consider in its first analysis the equitable reliance factors enunciated in *Chevron Oil*. It was likewise proper in its second analysis to weigh the Ohio constitutional right of access to court against the right to a statute of limitation which is not accorded either Federal or state Constitutional protection.

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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EXHIBIT A

WARREN and YOUNG
Attorneys at Law
134 West 46th Street P.O. Box 2300
Ashtabula, Ohio 44004
(216) 997-6175
Fax (216) 992-9114

December 2, 1994

VIA FACSIMILE TRANSMISSION
228-7200

James F. Szaller, Esq.
BROWN & SZALLER CO., L.P.A.
Atrium Office Plaza
668 Euclid Avenue, Suite 214-A
Cleveland, OH 44114

Re: Case No. 94-3
United States Supreme Court
Reynoldsville Casket Co., et al., Petitioners
v. Carol L. Hyde, Respondent

Dear Mr. Szaller:

This is to confirm our recent telephone conversation at which time I indicated to you that Petitioners, Reynoldsville Casket Co., and John M. Blosh, do not consent to your appearance as *amicus curiae* in the captioned case.

Very truly yours,
/s/ William E. Riedel
William E. Riedel

WER:djk

EXHIBIT B

WARREN and YOUNG
Attorneys at Law
134 West 46th Street P.O. Box 2300
Ashtabula, Ohio 44004
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Fax (216) 992-9114

December 7, 1994

VIA FACSIMILE TRANSMISSION
AND REGULAR MAIL
696-3924

Robert A. Marcis, Esq.
SPANGENBERG, SHIBLEY, TRACI,
LANCIONE & LIBER
1500 National City Bank Bldg.
629 Euclid Avenue
Cleveland, OH 44114

Re: Case No. 94-3
United States Supreme Court
Reynoldsville Casket Co., et al., Petitioners
v. Carol L. Hyde, Respondent

Dear Mr. Marcis:

This is to confirm that Petitioners, Reynoldsville Casket Co. and John M. Blosh, do not consent to your appearance as *amicus curiae* in the captioned case.

Very Truly Yours,
/s/ William E. Riedel
William E. Riedel

WER:djk

EXHIBIT C

WARREN and YOUNG
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134 West 46th Street P.O. Box 2300
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December 9, 1994

VIA FACSIMILE TRANSMISSION
AND REGULAR MAIL
228-7207

James F. Szaller, Esq.
BROWN & SZALLER CO., L.P.A.
Atrium Office Plaza
668 Euclid Avenue, Suite 214-A
Cleveland, OH 44114

Re: Case No. 94-3
United States Supreme Court
Reynoldsville Casket Co., et al., Petitioners
v. Carol L. Hyde, Respondent

Dear Mr. Szaller:

This is to confirm that Petitioners, Reynoldsville Casket Co. and John M. Blosh, do not consent to your appearance as *amicus curiae* in the captioned case on behalf of the Ohio Academy of Trial Lawyers and the Association of Trial Lawyers of America.

Very truly yours,
s/s William E. Riedel
William E. Riedel

WER:djk

EXHIBIT D

EARDLEY & ZULANDT
Attorneys and Counsellors at Law
114 East Park Street Chardon, Ohio 44024
Telephone (216) 286-6117
Fax (216) 286-6138

December 5, 1994

Mr. James F. Szaller
BROWN & SZALLER CO., L.P.A.
14222 Madison Avenue
Cleveland, Ohio 44107-4510

Re: Carol L. Hyde vs. Reynoldsville Casket Co., et al.
Case No. 92-1682
U.S. Supreme Court Case No. 94-3

Dear Mr. Szaller:

Pursuant to our telephone conversation of today's date, I grant permission for you to file an Amicus Brief in the above styled matter on behalf of Dalkon Shield's victims who are represented by Brown & Szaller and those represented by Spangenber, Shipley, Traci, Lancione and Liber.

I also give permission for you to file an Amicus Brief in the above styled matter on behalf of the Ohio Academy of Trial Lawyers and the Association of Trial Lawyers of America.

Sincerely,

EARDLEY & ZULANDT
/s/ David J. Eardley
David J. Eardley

DJE:vkk

EXHIBIT E

DALKON SHIELD CLAIMANTS TRUST
CLAIMS RESOLUTION FACILITY
POST OFFICE BOX 444
RICHMOND, VIRGINIA 23203
TELEPHONE 1-804-783-8600
FAX 1-804-782-0156

August 9, 1993

Dear Counsel:

I am writing in an effort to clarify some misconceptions about the purpose of the Trust's in-depth review/settlement conference process and to reiterate the Trust's "no negotiation" policy. Although we have stated our policy in writing on numerous occasions, some lawyers think the settlement conference will be a negotiating session.

The purpose of the in-depth review is to provide a claimant with a re-review of her claim. As the first step of the in-depth review, the Trust conducts a full audit of the claimant's medical records. Following this audit, and with the benefit of the additional information it produces, the Trust re-reviews the claim at a more thorough, "in-depth" level. Approximately, 90% of initial early settlement offers remain the same after the in-depth review. Of the 10% that change, about half go down and about half go up. The changes from the initial settlement offers are due to the full audit and closer scrutiny of the claims.

The purpose of the settlement conference is for Trust representatives to explain the strengths and weaknesses of your client's claim based on the medical records. It is not a negotiating session and the Trust's settlment offer cannot be changed through negotiations with the Trust representatives.

Very simply, the Trust's representatives cannot negotiate at settlement conferences.

The Trust's settlement conference representatives are not lawyers and are not trained to answer any legal questions or to comment on legal issues. Indeed, at the time of the settlement conference, no lawyer for the Trust has undertaken any effort to analyze the claim to determine appropriate legal defenses. No Trust lawyers are involved in the evaluation of the claim for purposes of extending an initial settlement offer, conducting the in-depth review and settlement conference, or extending final settlement offers. Counsel for the Trust do not analyze a claim unless or until a claimant rejects her final offer and proceeds to trial or regular arbitration.

The Trust's no-negotiation policy continues after a final offer has been rejected by a claimant or has been withdrawn 90 days after the settlement conference. As the Trust has previously stated, once an offer has been withdrawn and a case has been certified for litigation or arbitration, neither the original offer nor any other amount is available to the claimant. Many claimants mistakenly believe that settlement still is an option after a case has been certified.

Because of the Trust's fiduciary obligation to preserve its assets for all claimants and its commitment to make fair and best and final offers during the claims process, the Trust will not settle a case that is in litigation or arbitration. For the same reasons, the Trust, based on the facts and circumstances of each case and upon the advice of counsel, will assert all available defenses in these cases.

Sincerely,

/s/ Georgene M. Vairo

Georgene M. Vairo, Chairperson
Dalkon Shield Claimants Trust

EXHIBIT F

DALKON SHIELD CLAIMANTS TRUST
Claims Resolution Facility
Post Office Box 444
Richmond, Virginia 23203
Telephone: 1-804-343-4408
FAX: 1-804-782-0156

Michael M. Sheppard
Executive Director

By Certified Mail,
Return Receipt Requested

November 29, 1994

Donna R Harper-Brooks
C/O BROWN & SZALLER CO L P A
14222 MADISON AVENUE
CLEVELAND OH 44107-4510

Claim Number — DS237965

Dear Donna R Harper-Brooks:

If you do not accept your final offer within the 90 day period following your Settlement Conference, the Trust will send you an election form. You must complete this election form and return it to the Trust if you wish to pursue your Dalkon Shield claim through trial, binding arbitration or Alternative Dispute Resolution ("ADR"). The option to accept your final offer will remain available until you complete the election form and it is received by the Trust.

Certification Process

Once the Trust receives a properly completed election form, it will take appropriate steps with the United States District Court for the Eastern District of Virginia ("the Virginia Court") to certify you to go forward to trial, binding arbitration or ADR. The Trust will not be able to ask the Virignia Court to certify you to proceed with trial or binding arbitration unless we have received from you a written settlement proposal. Please note that this settlement proposal will not be used to negotiate your claim but is only a step that is necessary to comply with section E.4 of the Claims Resolution Facility ("CRF").

Once the Virginia Court has entered a certification order, you will be able to file or refile a lawsuit. If you elect binding arbitration or ADR, the Trust will initiate the process in accordance with the arbitration or ADR Rules, as appropriate, immediately upon receipt of the certification order. You may not proceed with litigation, arbitration or ADR until your claim is certified by the Virginia Court.

Considerations for Electing Trial or Arbitration

Before you decide whether to accept your offer or proceed with litigation or arbitration you should consider the following:

- The Trust will withdraw your offer when you elect arbitration or trial.
- The Trust will be your adversary in trial or arbitration and will vigorously defend against your claim.
- During the claims review process, the Trust did not review your claim from a legal standpoint. No lawyers looked at or evaluated your claim to determine its potential weaknesses. Once your case is in trial or arbitration, the Trust will be represented by legal counsel

who will advise it on which defenses to assert, including whether the statute of limitations may be applicable. The CRF permits the Trust to use all available defenses in trial. The Trust also may use all available defenses in binding arbitration, except for absence of product defect.

- Any award that you may receive in litigation or arbitration will be governed by what is referred to as the "holdback." This means if you receive a judgment or award that exceeds both $175,000 *and* your final Option 3 offer amount, you may not receive all of your judgment or award immediately. The Trust will pay $175,000 or the Trust's final settlement offer amount, whichever is greater, and will "hold back" the remainder until satisfied that enough money remains to pay all valid, timely Dalkon Shield Claims. If sufficient funds remain once all valid, timely Dalkon Shield Claims have been paid, the Trust will pay proportionately any unpaid amount from its remaining assets. The holdback allows the Trust to fulfill its obligation to take steps to ensure that everyone with valid, timely claims receives compensation for their injuries. There is no holdback in ADR.

  (Note: The Virignia Court's Amended Administrative Order No. 1, a copy of which is enclosed, refers to an initial minimum payment of $10,000 in a holdback situation. Effective September 15, 1994, the Trustees raised the minimum amount to the greater of $175,000 or the Trust's Option 3 offer.)

- The Trust will not negotiate with you once you have rejected or failed to accept your offer. The Trust will not engage in any settlement negotiations with you or your attorney after your claim proceeds to trial, arbitration or ADR.

In making your decision, it may be helpful for you to know about results where juries or arbitrators have decided recent Dalkon Shield cases after a full hearing of both sides' evidence. This information is shown on the enclosed chart of Jury Trial/Regular Arbitration Hearing Results, and is explained here.

As of November 1, 1994, decisions have been received in twenty-five regular arbitration cases and jury trials against the Trust involving twenty-nine claimants. The Trust's Option 3 offers to these claimants totaled $1,060,804. The claimants had submitted counteroffers demanding a total of $15,655,000 in damages. In thirteen of the cases, the claimants recovered nothing. The juries or the arbitrator found in favor of the Trust in twelve of those cases and the court directed a verdict for the Trust in the thirteenth. One other case resulted in a mistrial. Only eleven plaintiffs have prevailed against the Trust, and they were awarded a total of $1,043,500 in damages.

Considerations for Electing ADR

ADR provides claimants with the opportunity to present their cases to a neutral person and resolve their claims as quickly as possible and with as few legal complications as possible. The maximum amount recoverable in ADR is $20,000. Some of the advantages of ADR include:

- The Trust will not assert a statute of limitations defense in ADR.
- The Trust pays the administrative cost of ADR and the expenses of the independent referee who hears the ADR proceeding.
- The holdback does not apply in ADR.
- There is no formal discovery in ADR.

- ADR offers a quick resolution; the hearing lasts no more than 2-1/2 hours and most ADR hearings are held within 6 months of certification.
- The Trust will not be represented by a lawyer in the ADR hearing.

Information regarding the overall results of ADR hearings is shown on the enclosed chart of ADR Statistics, and is explained here. As of November 1, 1994, approximately 1,400 claims had been resolved through ADR. The Trust offered these claimants a total of $2,098,232 under Option 3. After the ADR hearings on these claims, the referees awarded the claimants a total of $8,030,574 in damages, which is almost four times what the Trust had offered.

Important Enclosures

Obviously, the decision to accept or reject your final settlement offer from the Trust is very important. To help you make your decision, we have enclosed the Amended Adminstrative Order No. 1, which is the Virignia Court's Order governing all litigation or arbitration proceedings. In addition, we have enclosed the CRF, the rules governing regular arbitration, the rules governing ADR, a booklet explaining arbitration, a booklet explaining ADR, a chart giving arbitration and jury trial statistics and a chart giving ADR statistics. Please read all of these materials very carefully before making yor decision.

Finally, if you do not have an attorney and wish to pursue your claim through regular arbitration or trial, the Trust recommends that you seek legal advice.

Sincerely,

Nina M. Gentry
Personal Contact

Enclosures:
Amended Administrative Order No. 1
Claims Resolution Facility
Rules Governing Regular Arbitration
Q & A — Common Questions About Arbitration
Arbitration Glossary
Jury Trial and Regular Arbitration Hearing Results Chart
Second Amended Rules Governing ADR
Q & A — Common Question About ADR
ADR Statistics Chart

EXHIBIT G

1993 SESSION LAWS

Chapter 419

SILICONE BREAST IMPLANTS OR DALKON SHIELD INTRAUTERINE DEVICES — PERSONAL INJURY OR DEATH — STATUTE OF LIMITATIONS — EXTENSION

AN ACT to authorize extension of the statute of limitations for commencing a cause of action for personal injury or death caused by silicone.

Approved and effective July 21, 1993.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

§ 1, of Section 1. Every cause of action for personal injury or death caused by the effects of silicone gel injected or implanted within the body, or caused by the effects of a silicone breast implant or its component parts implanted within the body, or caused by the effects of a dalkon shield intrauterine device inserted or implanted within the body, which is barred as of the effective date of this act or which was dismissed prior to the effective date of this act solely because the applicable period of limitations has or had expired, is hereby revived and an action, thereon may be commenced provided such action is commenced within one year from the effective date of this act or in the case of an action caused by the effects of a dalkon shield intrauterine device an action by a claimant of the Dalkon Shield Claimants Trust may be commenced within one year of certification to proceed with litigation provided, however, that this section shall not revive any action for damages for a wrongful act, neglect or default causing a decedent's death which has not been barred as of the date of the decedent's

death and could have been brought pursuant to section 5-4.1 of the estates, powers and trusts law, and provided, further that for any revived claim or action, including third party claims and claims for contribution pursuant to article fourteen of the civil practice law and rules for which a notice of claim is or would have been required by law as a condition precedent to the claim or action, a notice of claim shall not be required. Any action pursuant to this section commenced prior to the effective date of this act shall not be dismissed based upon any period of limitations.

This section shall not be applicable to any action for medical malpractice.

§2 — § 2. This act shall take effect immediately.

EXHIBIT H

SENATE BILL No. 607

AN ACT concerning civil procedure and civil actions; relating to limitation of civil actions related to Dalkon Shield victims.

Be it enacted by the Legislature of the State of Kansas:

Section 1. (a) Except as provided in subsection (c), notwithstanding any other limitation contained in article 5 of chapter 60 of the Kansas Statutes Annotated, any civil action, except an action for relief on the ground of fraud, brought by, or on behalf of, any Dalkon Shield victim against the Dalkon Shield claimant's trust, shall be brought in accordance with procedures established by the A.H. Robins company, inc. plan of reorganization, and shall be brought within 10 years of the time in which such cause of action shall have accrued.

(b) Any civil action for relief on the ground of fraud brought by, or on behalf of, any Dalkon Shield victim against the Dalkon Shield claimant's trust, shall not be deemed to have accrued until the fraud of A.H. Robins company, inc. was discovered, without regard to the date any physical injury occurred.

(c) The provisions of this act shall not affect any applicable statute of repose as otherwise provided by law.

(d) The provisions of this section shall be part of and supplemental to the provisions of article 5 of chapter 60 of the Kansas Statutes Annotated.

Sec. 2. This act shall take effect and be in force from and after its publication in the statute book.

EXHIBIT I

CALIFORNIA LEGISLATURE – 1993-94 REGULAR SESSION

ASSEMBLY BILL NO. 2855

Introduced by Assembly Members Archie-Hudson, Bronshvag, Barbara Friedman, Terry Friedman, Lee, Martinez, Moore, O'Connell, and Speier
(Coauthors: Senators Killea, McCorquodale, Torres, and Watson)

February 17, 1994

An act to add Section 340.7 to the Code of Civil Procedure, relating to limitation of actions.

LEGISLATIVE COUNSEL'S DIGEST

AB 2855, as introduced, Archie-Hudson. Limitation of actions.

Existing law sets the statute of limitations applicable to actions of injury or death caused by the wrongful act or neglect of another at one year.

This bill would enact an exception thereto with respect to certain actions against the Dalkon Shield Claimants' Trust, as specified, extending the statute of limitation to 15 years, tolling such actions as specified, and providing that these provisions apply to actions which have lapsed.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 340.7 is added to the Code of Civil Procedure, to read:

340.7. Notwithstanding subdivision (3) of Section 340, any civil action brought by, or on behalf of, any Dalkon Shield victim against the Dalkon Shield Claimants' Trust, shall be brought in accordance with the procedures established by A.H. Robins Company, Inc. Plan of Reorganization, and shall be brought within 15 years of the date on which the victim's injury occured, except that the statute shall be tolled from August 21, 1985, the date on which the A.H. Robins Company filed for Chapter 11 Reorganization in Richmond, Virginia.

This section applies regardless of when any such action or claim shall have accrued or been filed and regardless of whether it might have lapsed otherwise be barred by time under California law.

EXHIBIT J

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

C-3-80-527

PHYLLIS FROUG, et al.;

Plaintiffs

v.

A.H. ROBINS COMPANY,

Defendant

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on defendant's Motion for Summary Judgment. Defendant claims that plaintiffs' action is barred by the applicable statute of limitations. Furthermore, defendant asserts that the so-called "savings clause" of Ohio Rev. Code §2305.15, which tolls the statute of limitations in certain instances, is unconstitutional as violative of the Commerce Clause[1] of the United States Constitution. For the reasons discussed below, defendant's Motion is DENIED.

This case concerns an allegedly defective intrauterine device known as a "Dalkon Shield" which was manufactured by defendant, A.H. Robins Company. Plaintiff, Mrs. Froug, contends that she developed pelvic inflammatory disease after

[1]A similar New Jersey statute has recently withstood Equal Protection attack. *See, G.D. Searle & Co. v. Cohn*, __U.S.__ (1982), slip op. Defendant no longer challenges §2305.15 under the Equal Protection Clause.

the I.U.D. was inserted in July of 1971 and that the disease progressed even after it was removed in December of 1972. Mrs. Froug alleges that the defective design of the Dalkon Shield was the proximate cause of the disease which eventually necessitated a total hysterectomy in 1975.

Plaintiffs filed this suit on December 5, 1980. Defendant has raised the statute of limitations, Ohio Rev. Code §§2305.09 and 2305.10, as defenses. Section 2305.10 is a two-year statute of limitations that applies to actions for personal injury; this section applies to Mrs. Froug's claim for relief. Plaintiff's husband has sued for loss of consortium and for medical and hospital expenses; his claim is governed by Ohio Rev. Code §2305.09, which is a four-year statute of limitations.

Initially, the Court notes that the parties dispute the fact whether Ohio law recognizes a "manifestation" or a "discovery" rule regarding the statute of limitations. According to the manifestation rule, a cause of action accrues, and the statute begins to run, when the injuries manifest themselves. The limitation periods would have expired under the manifestation rule. Even if the Court concluded that the injuries manifested themselves on August 18, 1975, when the hysterectomy was performed, the four-year period of §2305.09 and the two-year period of §2305.10 would have run before this suit was filed in 1980. However, according to the discovery rule, the statute of limitations is tolled until the plaintiff gains actual knowledge of the causal connection between her injuries and the act(s) of defendant. Here, Mrs. Froug became aware of her injuries and the alleged cause thereof, the Dalkon Shield, on May 18, 1980, when her gynecologist mailed to her attorney an abstract of office records mentioning the name "Dalkon Shield." Under the discovery rule, the running of the statutes would have been tolled until May of 1980; this action would have been filed well within either the two or four-year periods.

The Court need not, however, resolve the issue of which rule Ohio law favors because both statutes of limitations were tolled by the "savings clause" of ORC §2305.15.

Section 2305.15 provides, in pertinent part, that:

> "When a cause of action accrues against a person if he is out of state, or has absconded, or conceals himself, the period of limitation for the commencement of the action. . . . does not begin to run until he comes into the state or while he is so absconded or concealed."

There is no doubt that this statute applies to defendant, a corporation that is neither incorporated under the laws of Ohio nor qualified to do business in the state. A foreign corporation on which personal service cannot be had in Ohio is "out of state" for purposes of the tolling provisions of the savings statute; the limtiations period does not begin to run until the corporation is subject to personal service notwithstanding the fact that *in personam* jurisdiction might be available by substituted service. *Ohio Brass Co. v. Allied Products Corp.*, 339 F.Supp. 417, 424 (N.D. Ohio 1972).

Defendant challenges the constitutionality of §2305.15 under the Commerce clause. However, the Ohio statute does not offend the Constitution according to either of the two tests set forth by the Supreme Court. Congress has been granted the power to regulate commerce among the states. However, many subjects of potential Congressional control go unregulated because of their local peculiarity, their number and their diversity. *South Carolina State Highway Dept. v. Barnwell Bros., Inc.*, 303 U.S. 177, 185. These subjects are therefore open to state and local control, so long as the regulations established do not go beyond the limits of the Commerce Clause. *Raymond Motor Transportation, Inc., v. Rice*, 434 U.S.

429, 440. Concerning the boundaries of the Commerce Clause, the Supreme Court has said that "[w]hat is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935). Where simple economic protectionism is the goal of state legislation, a virtually *per se* of invalidity applies. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). However, a much more flexible approach is used where there is no patent discrimination against interstate commerce:

> "Where the statue regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Arguing that the *per se* rule of invalidity applies, defendant cites to *Sioux Remedy Company v. Cope*, 235 U.S. 197 (1914). Defendant's reliance on the *Sioux Remedy* case is misplaced. In that case, an Iowa corporation was not permitted to collect the purchase price for goods sold and delivered to a South Dakota buyer. South Dakota had a statute prohibiting an out-of-state corporation from transacting business within the state unless the corporation registered with the Secretary of State and paid a filing fee. Furthermore, the corporation could not bring suit in a South Dakota court unless it appointed a resident agent for service of process, which would mean subjecting itself to the jurisdiction of all South Dakota state courts. The Supreme Court ruled that these statutes prohibiting a foreign corporation from transacting business in state or from

suing in state court violated the Commerce Clause because they were particularly burdensome to the enforcement of contractual rights. 235 U.S. at 205. Ohio "Savings Statute" does not affect a foreign corporation as drastically as the South Dakota statute. Section 2305.15 does not prevent an unregistered foreign corporation from transacting business within the state. Nor does it prevent that corporation from suing in a state court. Rather, §2305.15 operates to insure that a foreign defendant has an authorized agent in the state to accept service of process so that jurisdiction over the defendant may be had in as quick and expeditious a manner as possible. Thus it is apparent that the purpose of the savings statute is *not* economic protectionism. The *per se* rule of invalidity does not apply.

Defendant argues in the alternative that §2305.15 nevertheless is invalid according to the standards enunciated in the *Pike* case. *Pike* holds that where a statute regulates evenhandedly to effectuate a legitimate local public interest, it will be upheld unless its effect on interstate commerce is clearly excessive to the local benefit. *Pike v. Bruce Church, Inc., supra.*

The Court notes at the outset that the savings statute does operate evenhandedly. There is no patent discrimination against foreign defendants. Section 2305.15 applies whether the defendant is foreign or is an Ohio resident who conceals himself or absconds from the state. Ohio Rev. Code §2305.15; *Seeley v. Expert, Inc.*, 26 Ohio St.2d 61, 64-65 (1971), *Meekison v. Groschner*, 153 Ohio St. 301, 308 (1950) (concerning G.C. 11228, the predecessor statute to §2305.15). Nor does the savings statute differentiate between corporate and individual defendants. The word "person" in that section applies equally to corporations and natural persons. *Moss v. Standard Drug Co.*, 94 Ohio App. 269, 274 (1952).

Besides operating evenhandedly a statute must efffectuate a legitimate local interest in order to withstand consitituional scrutiny under the Commerce Clause. Curiously, the cases are devoid of any indication of the legislative intent behind §2305.15. This Court, therefore, makes a rational inference as to the purpose of the savings statute. That purpose falls within the broad ambit of the State's police powers. "The police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community." *Kovacs v. Cooper*, 336 U.S. 77, 83 (1949). The legislature, by enacting §2305.15, has intended to protect Ohio citizens from any harm that may befall them from persons who are either absent from the state or from residents who subsequently depart from the state. The rights of Ohio citizens[2] are preserved by tolling the statute of limitations until such time as the defendant enters or re-enters the state. Even though an out-of-state defendant may be subject to *in personam* jurisdiction by virtue of substituted service of process under Ohio Rule of Civil Procedure 4.3(B)(1), any act by an out-of-state defendant that prevents personal service nevertheless tolls the statute of limitations. *Mead Corporation v. Allendale Mutual Insurance Co.*, 465 F.Supp. 355, 361 (1979 N.D.Ohio); *Ohio Brass Co. v. Allied Products Corp.*, 339 F.Supp. 417, 424 (1972 N.D. Ohio). This is so despite the availability of long arm jurisdiction (under Ohio Rev. Code §2307.38.2) because a foreign defendant may be difficult to locate and serve. *G.D. Searle & Co. v. Cohn*, __U.S.__ (1982), slip op. at 6. Even though, in this case the defendant is a large corporation and easily located, does not render invalid the underlying assumption that many unrepresented foreign corporations are difficult to locate. *Id.*

[2]Note that non-resident plaintiffs are similarly protected regarding causes of action that accrue in Ohio. *See, Seeley v. Expert, Inc.*, 26 Ohio St.2d 61 (1971).

Having established that a legitimate local purpose exists, the Court must now determine whether the statute's effect on interstate commerce is clearly excessive in relation to the putative local benefits. Defendant contends that it is denied the benefit of the statute of limitations, unless it subjects itself to personal service in Ohio. Undoubtedly, this is a slight burden on interstate trade. However, Robins is not denied the possibility of prevailing in this action. Plaintiffs must still plead and prove all aspects of their case. Besides the statute of limitations is but an act of legislative grace; its shelter is not regarded as a "fundamental right." *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945).

Unlike the situation in *Sioux Remedy*, defendant Robins is not totally prevented from transacting business in the state. Nor is Robins precluded from suing in state courts to recover on otherwise valid contracts. Robins has and continues to do business in Ohio and reaps profits thereby.

Defendant argues that §2305.15 is an undue burden on interstate commerce because if defendant were to appoint a resident agent for service of process, its amenability to suit in Ohio courts would be greatly expanded. Robins argues that it would be unfair to subject itself to a potential multiplicity of actions because in many cases, it lacks the necessary "minimum contacts" with Ohio to establish personal jurisdiction. Defendant correctly points out that the decisive factor to be considered is "the relationship among the defendant [Robins], the forum [Ohio] and the litigation." *Shaffer v. Heitner*, 433 U.S. 186, 204 (1980). Curiously, Robins suggests that a less restrictive alternative to §2305.15 exists, namely, that jurisdiction may be invoked under Ohio's longarm statute, Ohio Rev. Code §2307.38.2, and process served by certified mail. Defendant thus admits, at least by implication, that the necessary minimum contacts do exist to tie it to the

state of Ohio. Ohio longarm jurisdiction may be exercised when, but not exclusively, the defendant: (1) transacts any business in Ohio; (2) contracts to supply services or goods in Ohio; (3) causes tortious injury in Ohio; or (4) breaches an express or implied warranty. Ohio Rev. Code §2307.38.2(A)(1-5).

Because Robins transacts business within Ohio, the necessary minimum contacts are present to establish long-arm jurisdiction. Substituted service of process by certified mail would ordinarily be available. However, because defendant is "out-of-state", the savings statute comes into play. The statutes of limitations are tolled until such time as defendant enters the state. There is no doubt that Robins is amenable to certified mail services. Defendant is a large, nationally-known corporation, whose whereabouts are easily identified. But the purpose of the savings statute is to lessen the plaintiff's burden in gaining personal jurisdiction over the defendant. Not all defendants are large corporations. Many defendants are hard to locate and/or travel from state to state, making certified mail service a difficult enterprise. Section 2305.15 is phrased in mandatory language. There are no exceptions for defendants whose actual location is known to the plaintiff. The savings clause simply preserves a plaintiff's cause of action by tolling the statute of limitations until such time as the plaintiff may personally serve the defendant.

For the reasons discussed herein, defendant's Motion for Summary Judgment is hereby DENIED.

/s/ Carl B. Rubin

Carl B. Rubin,
Chief Judge
United States District Court

EXHIBIT K

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-2-80-458

IN RE SHARY NUNLEY
AND OTHER PLAINTIFFS, et al
vs.
A. H. ROBINS COMPANY, INC.

MEMORANDUM AND ORDER
Consolidation and Bifurcation

1. *Background of the Litigation*

The Dalkon Shield is an intrauterine contraceptive device. It was invented and improved over a number of years by Hugh J. Davis, M.D. and Irwin S. Lerner. In November 1968, Mr. Lerner applied for a patent on the design of the Dalkon Shield. Two months later, he and Dr. Davis formed the Dalkon Corporation. The device was clinically tested by Dr. Davis at Johns Hopkins University, School of Medicine, from September 1968 to November 1969. At that time, it was commercially introduced to the medical profession by the Dalkon Corporation. On June 12, 1970, the A.H. Robins Co., Inc. (Robins), a manufacturer and distributor of pharmaceutical products, purchased all rights to the Dalkon Shield from Mr. Lerner and the Dalkon Corporation.

Robins initiated its national promotion and marketing of the Dalkon Shield in January 1971. Between the date Robins acquired the device from the Dalkon Corporation and June

28, 1974, when Robins voluntarily suspended distribution of the Dalkon Shield, approximately 2.2 million Dalkon Shields were prescribed to and inserted in women in the United States.

Dalkon Shield is a medically prescribed pharmaceutical product. It could be inserted and fitted by a physician. Each Dalkon Shield package contained labeling instructions and materials describing how the device was to be inserted, contraindication to its use and potential side effects. The fitting physician was to explain to the prospective wearer about the advantages and disadvantages of using the Dalkon Shield as a means of contraceptive method. If the decision was made to have the Dalkon Shield inserted, the physician was to perform certain preliminary fitting procedures outlined in the labeling instructions.

During the years in which the Dalkon Shield was sold, a number of women who had been fitted with the intrauterine device allegedly suffered adverse reactions and serious bodily injuries. Many of these women brought suits in federal courts against Robins. Their complaints alleged a number of legal theories for their recoveries, including negligence, gross negligence, strict liability in tort, failure to give adequate warnings, breach of warranties, misrepresentations, conspiracy and fraud. Additional defendants in some of these actions included plaintiffs' personal physicians, hospitals and clinic, and two physicians who served as medical consultants to Robins and who at one time held proprietary interests in the Dalkon Shield.[1] Because many of these actions involved common questions of facts, the Judicial Panel on Multidistrict Litigation pursuant to 28 U.S.C. § 1407 transferred actions in this litigation to the District of Kansas and assigned to The Honorable Frank G. Theis for coordinated and consolidated pretrial discovery

[1]Counsel has now advised the Court that Robins is the only defendant in these cases at bar.

proceedings. *In re A. H. Robins Co., Inc. "Dalkon Shield' IUD Products Liability Litigation,* Docket MDL 211, 505 F.Supp. 221 (J.P.M.L., 1981); 453 F.Supp. 108 (J.P.M.L., 1978); 419 F.Supp. 710 (J.P.M.L., 1976); 406 F.Supp. 540 (J.P.M.L., 1975).

II. *Dalkon Shield cases in the Southern District of Ohio*

On April 1, 1983, we received an assignment of the Dalkon Shield I.U.D. cases for the Southern District of Ohio. Of these 136 cases, 126 were filed in Columbus, 3 in Cincinnati, and 7 in Dayton. The total number of cases was increased to 153 when 17 more were added to the list at a later time. As of this time, November 30, 1983, there are 103 cases calendared — some 50 or so cases have been disposed of by dismissal or settlement.

Between May 20, 1983 and July 26, 1983, this Court held several conferences in Dayton, Ohio with the attorneys involved in these cases. To expedite the disposition of the Dalkon Shield cases, the Court issued a General Order outlining the pretrial and trial procedures. In this Order, and by agreement of the parties, the Court specifically mandated that the pretrial orders issued by Judge Frank G. Theis in the MDL 211, including the various rulings in the discovery proceedings, would apply to these cases presently pending in the Southern District of Ohio.

The Court has had occasion to call the attention of the parties to the time problems involved in trial of these cases. Counsel has advised that each case would require a minimum of six weeks or at least 30 trial days. The Court has noted that a 30-day trial could and would cause difficulty for a judge in the district with a full calendar or for a visiting judge. Nevertheless, the Court, by consent of counsel, scheduled cases in the following manner.

The court originally designated 15 cases (Group I) for trial on November 7, 1983. These cases were assigned strictly by reference to the oldest chronological dates of filing of all Dalkon Shield cases before the Court. The Court was advised that plaintiffs in these first 15 cases are represented by five different counsel including Mr. James Szaller and Mr. Phillip Zauderer, who represent seven plaintiffs in the first 15 cases. Mr. Zauderer also represents the plaintiffs in all but five or six of the remaining Dalkon Shield cases before this Court.

On July 26, 1983, we ordered counsel to prepare and circulate preliminary pretrial orders setting forth the discovery schedules and legal claims of each plaintiff in these first 15 cases. Counsel duly complied; and the Court approved these preliminary pretrial orders on August 22, 1983. The Court also ordered 30 back-up cases (Group II) to be ready for trial on November 7, 1983, in addition to the first 15 cases. Final Pre-trial Conferences were set on November 1, 1983 on any of these cases not settled or otherwise disposed by that time.

On August 26, 1983 and various occasions thereafter, Robins moved for summary judgment in a number of cases from Group I and II. Robins argued in these motions that plaintiffs' actions for personal injuries were barred by the applicable statute of limitations. Robins further asserted, in light of the recent New Jersey Supreme Court case, *Coons v. American Honda Motor Co., Inc.*, 463 A.2d 921 (N.J. 1983), that the application of the Ohio "savings clause," Ohio Rev. Code §2305.15, to it — a foreign corporation — violated the Commerce Clause of the U.S. Constitution.

We note Robins had previously raised these two issues in *Froug v. A. H. Robins Co., Inc.*, No. 82-527 (S.D. Ohio 1982), a companion case which was set for trial before the Court on November 7, 1983. In overruling Robins' motion for summary judgment, Judge Rubin in *Froug* found under the Ohio

law, as the Ohio State Supreme Court has consistently construed it, the "savings clause" tolling of the statute of limitations in personal injury cases is tied to a defendant's amenability to personal serivce. *See Seely v. Expert, Inc.*, 26 Ohio St.2d 61, 65-66 (1971). If a defendant is not amenable to personal service within the State of Ohio, that defendant is deemed to be "out of state" within the meaning of Section 2305.15 and the applicable statute of limitations is tolled from running in his favor. This rule applies even when the defendant is a non-resident of Ohio, and despite the fact that the substituted service is available under the Ohio long-arm statute. Judge Rubin concluded this tolling statute applies to Robins because Robins has never been incorporated under the laws of Ohio or registered to do business in that state.

Judge Rubin also rejected Robins' alternative argument to invalidate the "savings clause" as violative of the Commerce Clause of the U.S. Constitution. Judge Rubin found the "savings clause" did not impermissibly offend the Commerce Clause under the tests stated in *Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Pike v. Bruce Church, Inc.*, 297 U.S. 137 (1970); and *Sioux Remedy Company v. Cope*, 235 U.S. 197 (1914).

On October 6, 1983 we heard arguments from the respective parties concerning the issues raised by Robins in its motin for summary judgments in a number of cases from Group I and II. Robins focused its contention on the constitutionality of the savings clause, urging this Court to overrule Judge Rubin's decision in *Froug, supra*, in light of a recent New Jersey Supreme Court case, *Coons v. American Honda Motor Co., Inc.*, 463 A.2d 921 (1983). Robins argued this Court should follow the New Jersey court's decision, since it construed a New Jersey tolling statute similar to the Ohio savings clause.

Initially, it is observed that the *Coons* decision came from a divided court. Three justices of a seven-member panel dissented, questioning whether the majority has properly construed the tolling statute as violative of the Commerce Clause. The majority in *Coons* held the New Jersey tolling statute impermissibly placed an unconstitutional burden on interstate commerce when it required a foreign corporation to formally register to do business in New Jersey before it could appoint a resident agent to receive service of process and to get the benefits of the tolling statute. 463 A.2d 921, 926.

We find Robins' reliance on the *Coons* decision is misplaced, to the extent of that court's Commerce Clause holding. The Ohio tolling statute, in substance, is not the same as the New Jersey tolling statute. The Ohio tolling statute does not contain a provision which requires a foreign corporation to procure a certification of authority by registering to do business before it can appoint a resident agent for service of process in order to enjoy the benefits of the tolling statute. All the statute says is that if a defendant is not amenable to personal service within the State of Ohio, that defendant is deemed to be "out of state" within the meaning of the tolling statute and the applicable statute of limitations is tolled from running in his favor. *Seely v. Expert Inc.*, 26 Ohio St.2d at 65-66; *Vostack v. Axt*, 510 F.Supp. 217, 223 (S.D. Ohio 1981); *Mead Corporation v. Allendale Mutual Insurance Co.*, 456 F.Supp. 355, 361 (N.D. Ohio 1979); *Ohio Brass Co. v. Allied Products Corp .*, 339 F.Supp. 417, 424 (N.D. Ohio 1972). Whatever alleged hardship is created by this savings clause on foreign corporation, as plaintiff's counsel pointed out in the oral argument, can be eliminated by designation of a resident agent in Ohio for service of process. *Cf. G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982). Unlike New Jewsey, there is nothing in Ohio law to prevent Robins from doing that.

After having heard oral agruments from the parties on October 6, 1983, the Court announced from the bench its deci-

sion to overrule Robins' motion for summary judgment in these cases at bar. We adhere to that ruling and holding in *Froug, supra*. Our decision on the constitutionality of the tolling statute is, of course, subject to reconsideration if reasserted by any parties at the conclusion of any trial in which the statute may be applicable. Dkt. 113m.

At the October hearing, the parties were directed to have ready on or before November 1, 1983, at the Final Pre-trial Conference the following:

1) a list of their witnesses,
2) a summary of the testimony of such witnesses,
3) a list of all exhibits marked by and filed with the Clerk's Office,
4) written exceptions or objections to the testimony or exhibits with specific reference to the Federal Rules of Evidence to support each objection, and
5) any substantive motion with briefs for the Court to rule upon by November 1, 1983.

III. *Consolidation and Bifurcation, FRCP 42(a) & (b)*

On November 1, 1983, the Court held Pre-trial Conferences on 9 cases designated for trial on November 7, 1983.[2]

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[2]Phyllis Froug, No. C-3-80-527; Vicki Thompson, No. C-2-81-1489; Edith Binford, No. C-2-82-422; Anna Cassidy, No. C-2-82-379; Kathleen Flowers, No. C-3-83-080; Sharon Hemmerly, No. C-2-82-386; Rosalie Nunley, No. C-2-82-380; Martha Smith, No. C-2-82-389; Pauline Swinford, No. C-2-82-476.

Counsel estimated that it would take at least 30 trial days to complete trying a case if these cases were to be tried individually. This would take 270 trial days — and there would be over 100 cases left. It requires no clairvoyant power to conclude that any attempts to try these 100 or so cases *in seriatim* would bankrupt the already congested district court's calendar and result in a tedium of repetition lasting well into the next century.

The parties had prepared Proposed Pre-trial Orders to present to the court for approval and had filed numerous motions in limine for the Court to rule upon prior to trial scheduled for November 7, 1983. The Court noted that while counsel had been industrious in seeking to have a Pre-trial Order acceptable to the Court, it was, however, not satisfied. The Court found the summary testimony of the witnesses was not adequate. The objections to witnesses and exhibits would require additional rulings by the court. While the Court had indicated that it would, if time and other assignments permitted, try the cases in the order filed, the Court felt it would be inappropriate for it to commence the trial of the 9 cases on November 7, 1983.

At the same time, the Court announced its intention to invoke Rule 42(a) of the Federal Rules of Civil Procedure and to consolidate *all* Dalkon Shield cases presently pending before this Court. Additionally, the Court planned to bifurcate, under the authority granted by Rule 42(b) of the Federal Rules of Civil Procedure, these consolidated actions and to hold a "generic liability" trial. Counsel were advised to have the remaining cases ready for preliminary pretrial or pretrial proceedings in accordance with the Court's General Order.

The plaintiffs in these cases assert numerous theories of recovery, the Court observes from the complaints, the Preliminary Pre-trial Orders and the Proposed Final Pre-trial Orders, the theories of recovery do not significantly vary from case to case. The theories include negligence, gross negligence, strict liability in tort, breach of implied and express warranties, failure to give adequate warnings, misrepresentation, conspiracy and fraud. The Court is of the opinion that these theories may be segregated into two broad categories; product liability and misrepresentation.

The theories of negligence, gross negligence, strict liability in tort, and implied warranty all fall within the broad category of products liability. Misrepresentation, conspiracy, fraud and breach of express warranty all come within the category of misrepresentation. Additionally, the adequacy of the defendant Robins' warnings raise questions related to both categories.

Because the theories are essentially the same, the Court envisions that the resolution of these cases can be greatly simplified and expedited in two ways. First, the extent to which the theories are repetitive, only some theories need to be tried. Second, these cases can be consolidated and bifurcated for trial on issues relating to liabiity under each category. *See*, Rule 42 of the Federal Rules of Civil Procedure.

First, the category of products liability contains repetitive theories. In Ohio, there is virtually no distinction between strict liability under § 402A of the Restatement (Second) of Torts and breach of implied warranty. ***Temple v. Wean United, Inc.***, 50 Ohio St.2d 317, 364 N.E.2d 267 (1977). The key issue under either of these theories is whether the product is in a defective condition. Three recent Ohio Supreme Court decisions have developed how this issue is resolved. ***Leichtamer v. American Motors Corp.***, 67 Ohio St.2d 456, 424 N.E.2d 568 (1981); ***Knitz v. Minster Machine Co.***, 69 Ohio St. 2d 460, 432 N.E.2d (1982); ***Cremeans v. International Harvester Co.***, 6 Ohio St.3d 232 (1983). Similarly the question of whether defendant was negligent or grossly negligent is dependent on a defect in the product. Also, whether defendant gave adequate warnings, in part, is related to existence of a defect in the product. As the court said in ***Knitz v. Minster Machine Co., supra:***

> Appellant also offers the proposition that the failure to give adequate warnings gives rise to a cause of action in strict liability. As we pointed out in *Temple*, 50 Ohio St.2d at page 325, 364 N.E.2d 267, '[i]t is . . . apparent that the rule imposing obligation on the manufacturer or seller to give suitable warning of a dangerous propensity of a product is a rule fixing a standard of care, and any tort result from the failure to meet this duty is, in essence, a negligent act. . .
>
> Moreover, we held in *Leichtamer*, 67 Ohio St.2d at page 469, 424 N.E.2d 568, that '[t]he absence of a warning does not, without more, provide a basis for [strict] liability; rather, evidence of warning is in the nature of an affirmative defense to a claim that a product is unreasonably dangerous.'

432 N.E.2d at 818 fn. 5. *See also*, Restatement (Second) of Torts, § 402A, Comment J, k. *See also, Seley v. G.D. Searle & Co.* 67 Ohio St.2d 192, 423 N.E.2d 831 (1981).

From the foregoing, the Court concludes that all theories within this first category have the same central issue: namely, was there a defect in the Dalkon Shield? Even though this issue is resolved a bit differently under some theories, i.e., there are differing standards of care, each will depend on the same evidence.[3]

Similarly within the second broad catregory, there are questions common to each theory. Misrepresentation, conspiracy, fraud and breach of express warranty[4] all require determinations of what representations the defendant made, and whether

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[3]*See, In re Northern District of California, Dalkon Shield IUD Products Liability Litigation*, 693 F.2d 847, 852 (9th Cir. 1982), *cert. denied*, 103 S.Ct. 817 (1983).

[4]Ohio recognizes a common law breach of express warranty. *Rogers v. Toni Home Permanent Co.*, 167 Ohio St.2d 244, 147 N.E.2d 612.

any of those representations were false and misleading. Also, the issue of adequacy of warnings is dependent on what representations were made by the defendant. *See, Seley v. G.D. Searle & Co., supra;* Restatement (Second) of Torts § 402A, Comment K.

In addition to the theories of liability, two other issues, common to all these cases, can be resolved in this "generic liability" trial. First, all plaintiffs in these cases allege that a Dalkon Shield caused each plaintiff to suffer pelvic inflammatory disease (PID). In each of these cases, a jury must decide whether a Dalkon Shield can cause PID. It is apparent that the evidence offered on this issue will be the same for each of these cases. Therefore, this question can be resolved in the "generic liability" trial. Later in the individual trials, whether the Dalkon Shield was indeed the proximate cause of each alleged injury may be determined.

Second, whether punitive damages are to be awarded, and if so, what is the proper amount can be decided in the "generic liability" trial. Punitive damages are dependent upon the defendant's behavior. The focus of the "generic liability" trial will be Robins' behavior. The jury in that trial will have all the evidence necessary to decide whether or not to award punitive damages and if so how much, before it. By considering punitive damages only in the "generic liability" trial, the Court can limit, in these cases, the potential excessive awards of punitive damages, which Robins addressed in its trial brief and the court in *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967) discussed at length.

As stated above, the Court is convinced that resolution of these cases can be simplified and expedited by consolidating and bifurcating these cases for trial on the following issues: 1) Are Dalkon Shields in a defective condition; 2) Did Robins give warnings that were adequate; 3) What representations

did Robins make; 4) Were any of these representations false or misleading; 5) Do Dalkon Shield cause PID; and 6) Are the plaintiffs entitled to punitive damages and, if so, to what amount.

In the Court's opinion, these issues focus solely on Robins' behavior. What any plaintiff did, or the injuries suffered by the various plaintiffs would not be relevant to these issues. Later, if necessary, each case would have its own trial where questions such as individual proximate cause, reliance, damages, and affirmative defenses could be decided.

That this is the only reasonable way to proceed in these cases is reinforced by the witness lists which the parties attached to their Proposed Final Pretrial Statements. Robins, for instance, lists the same witnesses for each case. Also, the different groups of plaintiffs intend to use many of the same witnesses. Thus, the Court anticipates that the evidence will not significantly vary from case to case.

Additionally, this method will diminish some of the concerns raised by Robins in its motion for limine. For instance, should the jury in the "generic liability" trial decide that certain representations made by Robins were false, this fact would not be admitted into the individual trials until there was evidence that the particular plaintiff relied on the representation.

For this to work, the Court will rquire the cooperation and assistance of all counsel. Specifically, the Court will need counsel to draft jury interrogatories relating to the issues which, as outlined above, will be decided in the "generic liability" trial. These will serve as the basis of stipulation to be read to the juries in the individual trials.

IV. *Conclusion*

The Court stated at the last conferences that it would issue a written summation of its intentions so that counsel could file

written responses to it. The Court further stated that, if necessary, it would schedule a hearing to meet with counsel of record with the view to discuss matters concerning this Memorandum and Order to implement the Court's intentions to consolidate and bifurcate this litigation. The Court once again reminds all counsel that just as they will devote their energy and ability to trying to dissuade the Court from proceeding in this manner, they invest the same effort and skill to insuring that this method is as successful as possible.

Accordingly, IT IS ORDERED that all Dalkon Shield I.U.D. caes (sic) filed in the Southern District of Ohio are consolidated under Rule 42(a) of the Federal Rules of Civil Procedure.

IT IS FURTHER ORDERED that this consolidated action is bifurcated under Rule 42(b) of the Federal Rules of Civil Procedure and the Court will hold a "generic liability" trial on the following issues:

1) Are the Dalkon Shields in a defective condition;
2) Did Robins give adequate warnings;
3) What representations did Robins make;
4) Were any of these representations false or misleading;
5) Does the Dalkon Shield cause pelvic inflammatory disease; and
6) Are the plaintiffs entitled to punitive damages and, if so, to what amount.

Counsel are requested to have available for review proposed jury instructions and interrogatories to implement the determination of the issues as outlined above for the "generic liability" trial proceedings.

In addition, the Court will review proposed Preliminary Pretrial Orders and Pre-trial Orders with a view to adopting them to the Court's General Order and the Order contained above.

IT IS FURTHER ORDERED that a hearing in said consolidated cases be, and hereby is set before the undersigned Judge for Wednesday, December 21, 1983, at 9:30 a.m. at Dayton, Ohio.

This Order shall apply to all Dalkon Shield I.U.D. cases pending in the Southern District of Ohio.

Dated this 1st day of December, 1983.

/s/ Wesley E. Brown
United States District Senior Judge,
Assigned